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In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY

VIRGINIA REA ASSOCIATION, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY

BRIEF FOR FEDERAL POWER COMMISSION IN OPPOSITION

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FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY

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FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY

BRIEF FOR FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (V, 29) is reported at 191 F. 2d 796. The opinion and order of the

Federal Power Commission are not reported but appear in the Appendix (I, 41 *et seq.*)[1]

JURISDICTION

The judgment of the Court of Appeals was rendered on October 1, 1951 (V, 68). Petitions for rehearing filed on October 30, 1951 (V, 47) were denied on November 5, 1951 (V, 72). On January 29, 1952, this Court extended the time for filing petitions for writs of certiorari to and including April 1, 1952, and the petitions were filed within that time. The jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act.

QUESTIONS PRESENTED

I. Whether the Petitioners are "aggrieved" parties so as to be entitled to court review of the Federal Power Commission's order issuing a license for development of a hydroelectric project in the Roanoke River, North Carolina.

II. Whether Section 10 of the Flood Control Act of 1944, approving a comprehensive plan of development for the Roanoke River Basin, authorizes Federal construction of the Roanoke Rapids project and precludes the Commission from issuing a license under the Federal Power Act for

[1] Volumes I, II, and III of the record constituted the petitioner's Appendix filed in the Court of Appeals. Volume IV was similarly filed by Virginia Electric and Power Company and Volume V includes the proceeding in the Court of Appeals. References to the unprinted record are given as "R. ——."

construction and operation of the Roanoke Rapids development in the Roanoke River, North Carolina, by Virginia Electric and Power Company (VEPCO).

III. Whether the Commission is precluded from granting the license here questioned by reason of its approval of the comprehensive plan for the development of the Roanoke River Basin.

STATUTES INVOLVED

The provisions of the Federal Power Act (41 Stat. 1063, as amended, 16 U. S. C. 791a, *et seq.*) appear in the pamphlet copy of the Act submitted with this brief. The pertinent provisions of the Flood Control Act of 1944 (58 Stat. 887) are set out in Appendix pp. 33–36.

STATEMENT

On October 6, 1948, VEPCO filed an application under Section 4 (e) of the Federal Power Act for a license to authorize it to construct, operate and maintain a hydroelectric power project on the Roanoke River at Roanoke Rapids, North Carolina. The application was amended, hearings were held, and an Examiner recommended issuance of a license (IV, 1045) over the objections of the Secretary of the Interior and the Virginia REA Association. A further hearing was held at the request of the Secretary and the REA Association; and the Examiner, in a supplement to his earlier decision, again recommended a license (IV, 1107).

Exceptions to the decision of the Examiner were filed by the Secretary and the REA Association and oral argument heard thereon by the Commission. On January 26, 1951, the Commission issued its opinion and order in which, with supporting findings, it issued a license to VEPCO (I, 41). Permission to intervene before the Commission was given to the Secretary (I, 71), the REA Association and two power companies (R. 5255). Petitions for rehearing were timely filed by the Secretary and the REA Association and denied by the Commission (R. 6110), after which petitions were filed in the Fourth Circuit for review of the order under Section 313 of the Federal Power Act.

ARGUMENT

I

PETITIONERS DID NOT HAVE THE STANDING NECESSARY TO OBTAIN COURT REVIEW OF THE ORDER

Regardless of the other questions sought to be presented, certiorari should be denied because the court below was clearly correct in holding that Petitioners did not have standing under the statute to obtain court review of the Commission's order, its holding was not in conflict with any other decision, and no sufficient question is presented which has not been and should be decided by this Court.

The Power Act's "distinctive formulation of the conditions under which resort to the courts

may be made," by which Congress has determined "the scope of the jurisdiction of the lower courts"[2] to review orders of the Commission, specifies (Section 313 (b)):

> Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States.[3]

None of the three interests asserted by the Secretary in No. 658 and none of the further interests asserted by Petitioners in No. 659, which are dependent upon those of the Secretary and will be considered in connection therewith, was sufficient to make any petitioner a "party aggrieved" by the Commission's issuance of a license to VEPCO.

A. Petitioners first assert that the Fourth Circuit erred in holding that the Secretary is given no responsibility under Section 5 of the 1944 Flood Control Act (App., p. 33) with respect to a project like Roanoke Rapids until "the Government has authorized a project and entered upon its construction"[4]—not because of anything

[2] *F. P. C.* v. *Pacific P. & L. Co.*, 307 U. S. 156, 159.

[3] Failure to satisfy such statutory requirements necessitates dismissal of a petition for review of a commission order without reaching any question as to its validity. *Interstate Electric, Inc.* v. *F. P. C.*, 164 F. 2d 485 (C. A. 9); *W. O. W. Life Ins. Co.* v. *F. C. C.*, 105 F. 2d 75 (C. A. D. C.).

[4] The Fourth Circuit by footnote called attention to the fact that under the literal terms of Section 5 the Secretary's responsibility is limited to "electric power and ener-

they point to in the wording of Section 5, or in the rest of the Act or its legislative history, but because of Section 3 of the River and Harbor Act of 1917, and what the Secretary regards as the practical importance of his having such responsibility (Pet. 14–16).

But the only authority which Section 3 of the River and Harbor Act of 1917 vested in the heads of the several departments of the Government was the authority to "detail representatives from their respective departments to assist the Engineers of the Army in the study and examination of such watersheds."[5]

It was merely a procedural provision for coordination of the discharge of statutory responsibilities

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gy generated at reservoir projects under the control of the War Department and *in the opinion of the Secretary of War not required in the operation of such projects*" (V, 31). Petitioners argue that the court erroneously assumed, without support in the record, that the mode of establishing such opinion would be by certificate, whereas, Petitioners assert, also without support in the record, that it would be by a "Definite Project Report." (Pet. 12–14.) This seems to require no answer for there is no claim that there has been either with respect to the Roanoke Rapids unit. *Cf.* Pet. in No. 658, p. 14, note 8.

[5] The relevant part of paragraph of Section 3 of the River and Harbor Act of 1917 (39 Stat. 950, 33 U. S. C. 1946 ed., § 701) reads as follows:

"* * * And the heads of the several departments of the Government may, in their discretion, and shall upon the request of the Secretary of War, *detail representatives from their respective departments to assist the Engineers of the Army in the study and examination of such watersheds, to the end that duplication of work may be avoided and the various services of the Government economically coordinated therein.* [Italics supplied.]

existing under other statutes, not the creation of new responsibilities. That the Secretary of the Interior had no such responsibility under any other statute with respect to the Roanoke River Basin is shown by the fact that he did not detail such representatives to participate in the Roanoke survey, nor was he requested to do so. It is for this reason that his petition relies basically on the Flood Control Act of 1944.

Furthermore, as for the claim of the practical importance of the Secretary's having the responsibility for planing public power developments before project construction begins, until Congress manifests an intention to give it to him, such considerations must still be addressed to Congress, not to the courts. The absence of any provision in Section 5 for such responsibility was not inadvertent. Questions during debates on that Act and replies thereto made by Chairman Whittington, of the House committee reporting the bill, make plain that the Secretary's exercise of such responsibility had been intentionally foreclosed.[6] And the Senate committee report shows

[6] Mr. WHITTINGTON. * * * The necessity for this language is this: In some of these reservoirs that are authorized to be constructed there is generation of power. The concrete proposition that confronted our committee was this: Shall we authorize these projects where power is incidental and make no provision for the disposal of it, or shall we leave it to the President of the United States to set up an executive authority as he has done in Arkansas, Texas, and Okla-

that the limited scope of power conferred upon the Secretary was deliberate.[7]

Finally, the withholding from the Secretary of preconstruction responsibility for planning and recommending Federal development of hydroelectric resources is made plain by the grant of

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homa? * * * We have said that the matter of power is to be passed on by the Chief of Engineers and by the Federal Power Commission. We have provided that there shall be a transmittal of projects so that each can get the benefit of the other's views. I may say in reply to the gentleman's question that the Secretary of the Interior has no control whatever over the construction of any dam under the control of the War Department.

Mr. JENKINS. Can the Secretary of the Interior under the language and authority of this law build a foundation upon which he and the President can scatter some more T. V. A.'s all over the Nation? I should hope it does not.

Mr. WHITTINGTON. No, he has no power whatever with respect to building and construction, and his power is limited only to the sale and transmission of the excess power generated at dams authorized and constructed by the War Department. (90 Cong. Rec. 9418–9419.)

[7] The committee desires an amendment which provides a convenient and practical method of disposing of power at projects under the control of the War Department without setting up a public power trust which would be unduly competitive with established private power utilities. The committee, therefore, has inserted a proviso [now Section 5 of the Act] which authorizes the Secretary of the Interior to construct and acquire only such transmission lines or related facilities as may be necessary in order to make the power and energy generated at such projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. (Sen. Rep. No. 1030, 78th Cong., 2d Sess., p. 3 (1944).)

that power to the Commission in Section 7 (b) of the Power Act. Prior to the reorganization of the Commission as an independent agency in 1930 (46 Stat. 797), the Secretary was one of the three ex officio members comprising the Commission (41 Stat. 1063, 16 U. S. C. 792). By that reorganization there was taken from the Secretary participation in the very responsibility he now would ask this Court to give to him.

B. Petitioners next seek to qualify as "aggrieved" parties under the *Sanders* and *Scripps-Howard* cases[8] by calling themselves "competitors" of VEPCO (Pet. in No. 658, 17–22; Pet. in No. 659, 3–4). In the first case the broadcasting station was "aggrieved" because it would suffer a direct reduction in its advertising revenues, and, in the second, reduction in the number of listeners within its "coverage," from the Commission's action.

But here the Commission's issuance of a license to VEPCO will not cause petitioners a reduction or loss of any kind in the disposition of the output of the Buggs Island project under the provisions of the applicable statutes. The claimed competitor interest of the Secretary is no business, or activity, or duty he now has. It depends on further action which he hopes would be taken by Congress in respect to Roanoke Rapids. Thus,

[8] *F. C. C.* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 476–477; *Scripps-Howard Radio, Inc.* v. *F. C. C.*, 316 U. S. 4, 14–15.

denial of a license to VEPCO, in itself, would not enable the Secretary to integrate Buggs Island's power with that of Roanoke Rapids and sell both at a lower rate for their pooled output. Congress would first have to authorize a Federal development at Roanoke Rapids and pass several successive appropriations for preparation of construction plans and for construction; the Army would have to undertake the construction; and the availability of power for marketing by the Secretary would have to be established (*supra*, p. 5, note 4). Until and unless those events take place, denial of a license would mean no more than freedom for the Secretary to urge action by Congress—assuming, *arguendo*, he can be said to be free, *as Secretary*, to do that which Sections 7 (b) and 4 (g) have placed within the responsibility of the Commission.

This claimed competitor interest, being no more than a desire to prevent private development of a site which if left undeveloped by private interests, the Secretary hopes he might some day persuade Congress to develop and entrust the marketing of surplus power therefrom to the administration of his Department, is not of sufficient immediacy and reality (*Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270), is too speculative to be substantial (*National Broadcasting Co.* v. *F. C. C.*, 132 F. 2d 545, 548 (C. A. D. C.)), and is too problematical (*United States Cane Sugar Refiners Assn.* v. *McNutt*, 138 F. 2d 116, 119 (C. A. 2))

to support a constitutional "case or controversy." *National Coal Association* v. *F. P. C.* (191 F. 2d 462, 464–467 (C. A. D. C.)) upon which Petitioners rely, only serves to emphasize the Secretary's lack of the kind of interest there held sufficient to cause the parties to be "aggrieved." The Commission's order there involved was one issuing a certificate of convenience and necessity to supply natural gas for use as boiler fuel at the Oak Ridge, Tennessee, plant of the Atomic Energy Commission. The parties held entitled to obtain review were coal companies who would lose the Oak Ridge market they had previously enjoyed, their employees who would consequently lose jobs, and employees of railroads which had previously carried the coal to Oak Ridge. The importance of the distinction between loss of an existing status and deprivation of a possibility of acquiring a status has been recognized. *Ashbacker Radio Co.* v. *F. C. C.*, 326 U. S. 327, 332.

Furthermore, even if denial of a license to VEPCO were all that was necessary to bring about the immediate marketing of Roanoke Rapids power by the Secretary, his interest would still, in reality, not be like that of a business competitor for under Section 5 of the Flood Control Act, the Secretary must sell at rates based on cost. Ability to pool Buggs Island power with Roanoke Rapids power would therefore produce no pecuniary benefit in any event. (It may be noticed that it is not claimed that Buggs Island power is

not marketable at its own higher cost.) Not only is there no pecuniary interest in selling more power without profit, but the Secretary has no other interest (such as a noncommercial radio station might have in maintaining the number of its listeners), in the absence of a present statutory responsibility, as already discussed. In no sense, then, can the Secretary have a competitor interest like those which were sufficient to establish aggrievement within the meaning of the statutory review provisions in the *Sanders* and *Scripps-Howard* cases.

Similarly, the competitor interest alleged by the petitioners in No. 659 depends on their ability to purchase Roanoke Rapids power from the Secretary (Pet. 3–4), which is a step more remote than that of the Secretary's ability to sell the power. The same is true of their claimed interest as potential consumers of Roanoke Rapids power, if marketed by the Secretary (Pet. 5–6).[9]

[9] Petitioners in No. 659 also claim an interest in the headwater benefits payments VEPCO must make to the United States under Section 10 (f) of the Power Act. An estimate of such payments was used by the Commission in determining economic feasibility of the Roanoke Rapids development proposed by VEPCO (*infra*, p. 24). Nothing in the Commission opinion or order constitutes a determination fixing liability for such payments, as Petitioners mistakenly assume in arguing that they have an interest as purchasers of Buggs Island power in higher payments and as consumers of VEPCO power, in lower payments (Pet. 6–7). Their further claim that if the payment is so large

C. Lastly the Secretary claims standing to obtain review as representing the interests of the United States, *parens patriae*. But not only has the Solicitor General not authorized any one party more than any other so to represent the United States in this proceeding, as we read his authorization (Pet. No. 658, p. 58), but no statutory authority is cited for such a "public defender" procedure[10] or for converting the Court of Appeals review under Section 313 of the Power Act into a quo warranto proceeding at the instance of the Secretary. His pertinent powers and duties as to marketing surplus power (*supra*, pp. 5–9), prescribing fishways,[11] fixing other license conditions for protection of reservations, and approving license fees for certain projects,[12] afford no basis for implying such supervisory control over the Commission in the absence of express language.

Cia Mexicana de Gas v. *F. P. C.*, 167 F. 2d 804, 805–806 (C. A. 5), allowing the State of Texas to

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as to make the project uneconomical they have an interest in Federal construction of Roanoke Rapids (Pet. 7), like the claimed interest of the Secretary, being contingent on the congressional action referred to, is too contingent and speculative.

[10] *Cf. Vinson* v. *Washington Gas Light Co.*, 321 U. S. 489. For an example of an express provision for public defender see District of Columbia Code, § 43–205.

[11] Section 18 of the Federal Power Act.

[12] Section 4 (e) of the Act.

obtain review of a Commission order, is not in conflict with the decision of the court below for there the State was an active and real party, duly represented by its Attorney General, not a nominal party represented by a volunteer whose authority to do so with respect to the particular subject was questioned, as is the case here.

Petitioners argue that inasmuch as the Commission's authority to grant the license was in issue, the court below had begged the question in holding that Congress had not committed to the Secretary responsibility for planning or recommending Federal hydroelectric developments (Pet. in No. 658, 24). But the logical fallacy in this argument is the assumption that if a site is not within the licensing jurisdiction of the Commission it must necessarily be within some power of the Secretary. We have already shown that this is not true, for the Secretary's responsibility cannot precede commencement of Federal construction (*supra*, pp. 5–9).[13]

II

CONGRESS DID NOT IN THE FLOOD CONTROL ACT OF 1944 ENTER UPON FEDERAL IMPROVEMENT OF THE ROANOKE RAPIDS SITE OR WITHDRAW THAT SITE FROM THE COMMISSION'S LICENSING AUTHORITY

The Secretary in No. 658 contends that the Fourth Circuit erroneously refused to interpret

[13] *United States v. [illegible] U.*, 337 U. S. 426, does not help the Secretary because [illegible]urt did not there pass on the question of standing to obtain review as an "aggrieved" party.

Section 10 of the Flood Control Act of 1944 as constituting the adoption by Congress of the eleven proposed projects in the Roanoke River Basin for development by the United States and the withdrawal of Roanoke Rapids as one of the eleven from the licensing jurisdiction of the Commission (Pet. in No. 658, 25, 45, 56).

The Secretary thus says there has been in effect *pro tanto* repeal of the licensing authority of the Federal Power Act by implication from obscure words in Section 10 of the 1944 Act. This contention, if valid, would virtually nullify the licensing of power projects under the provisions of the Federal Power Act. It goes counter to established precedents of this Court that repeal by implication will be found only where the implication is clear.[14] While projects expressly authorized are withdrawn from licensing, *Savannah River Co.* v. *F. P. C.*, 164 F. 2d 408 (C. A. 4), it is here argued that something less than an express authorization is sufficient to reserve the Roanoke Rapids project for Federal development.

THE LANGUAGE OF THE VARIOUS FLOOD CONTROL ACTS DOES NOT SUPPORT THE SECRETARY'S CLAIMS

The genesis of the Secretary's argument is in Section 6 of the Flood Control Act of 1936 (49

[14] *F. T. C.* v. *A. P. W. Paper Co.*, 328 U. S. 193, 202; *United States* v. *Jackson*, 302 U. S. 628, 631; *United States* v. *Tynen*, 11 Wall. 88, 92; *United States* v. *California*, 297 U. S. 175, 188; *Posadas* v. *National City Bank*, 296 U. S. 497, 503; *Cf. H. Rover Co.* v. *Crivella*, 105 F. 2d 434, 436 (C. A. 8).

Stat. 1570, 1592), which directed the Secretary of War to make preliminary investigations and surveys for flood control on a large number of streams, including the Roanoke River, with the proviso, *taken from previous statutes directing surveys and reports*, that—

> the Government shall not be deemed to have entered upon any project for the improvement of any waterway mentioned in this *Act* until the project for the proposed work shall have been adopted by law. [Italics supplied.]

Since this proviso obviously was not the adoption by law of any projects, the Secretary claims that such adoption by law comes from the "adoption and authorization" in the opening paragraph of Section 10 of "the following works of improvement" (Pet. in No. 658, 31–6). The court rejected the claim (V, 33). The fact that the Act expressly authorized certain of the projects in a specific paragraph on the Roanoke River Basin, the lower court said, is clear indication that others embraced only in approved plans were not authorized (V, 34), a principle of statutory construction recognized by this Court. *MacEvoy Co. v. U. S.*, 322 U. S. 102, 107.

The specific paragraph in Section 10 on the Roanoke River Basin complements and gives applicability to the general provisions of the opening paragraph, an interpretation which is not dependent upon a construction that a specific pro-

vision in a statute should prevail over a general one, as suggested (Pet. in No. 658, 33).

The Roanoke River Basin paragraph in Section 10 reads:

> The general plan for the comprehensive development of the Roanoke River Basin for flood control and other purposes recommended by the Chief of Engineers in House Document Numbered 650, Seventy-eighth Congress, second session, is approved and the construction of the Buggs Island Reservoir on the Roanoke River in Virginia and North Carolina, and the Philpott Reservoir on the Smith River in Virginia, are hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in that report at an estimated cost of $36,140,000.

A mere reading of the opening paragraph of Section 10 shows that the general plan dealing with the Roanoke River Basin could not have been included in the works "adopted and authorized" in the opening paragraph, for that paragraph restricts the "adoption and authorization" to "the following works of improvement" and clearly the general plan is not a "work of improvement" within the ordinarily and commonly understood meaning of those words. That this analysis of Section 10 is the proper one is underscored by the fact that the "works of improvement" "adopted and authorized" are described in the introductory paragraph of Section 10 as

"projects authorized in this Act to be constructed by the War Department during the war," and "projects" which were to be "initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements" "when the existing critical situation with respect to materials, equipment, and manpower no longer exists" (App. p. 34). Roanoke Rapids was not among the "works" expressly named under any of the thirty-eight subparagraphs following the introductory paragraph of Section 10. True, it was one of the eleven dams in the comprehensive plan "approved" in the specific subheading relating to the "Roanoke River Basin." But it was not one of the dams expressly authorized to be constructed, and the introductory paragraph did not "adopt and authorize" works "described in the following approved plans," as the Secretary would have it, or use any comparable language. Indeed, if the "approval" of the general plan constituted "adoption and authorization" of the eleven dams embraced in the plan, including Roanoke Rapids, Buggs Island and Philpott, there is no explanation offered by the Secretary of the express "authorization" of Buggs Island and Philpott. We submit the answer lies in the fact that "approval" of the general plan for comprehensive development of the Roanoke River Basin did not constitute "adoption and authorization" of the "following works" as those

words are used in the introductory paragraph of Section 10.

Further, Roanoke Rapids was not a work which was "authorized to be constructed by the War Department" because, as already stated, authorization was given only for Buggs Island and Philpott. The necessity for authorization (admittedly necessary, Pet. in No. 658, 26–27) for those projects (authorization for construction at a stated cost or authorization for appropriation), precludes any implied authorization of Roanoke Rapids.

This construction does not, as the Secretary contends (Pet. in No. 658, 33, 35) render meaningless any provisions of Section 10 of the Flood Control Act of 1944. As we have shown, full vitality is accorded the words "adopted and authorized."

And the significance of the approval of the general plan becomes apparent from an examination of the history of such procedures. The improvement of rivers under comprehensive plans has been a matter of concern in Congress for many years. One of the cornerstones of the Federal Water Power Act as passed in 1920 was the requirement in Section 10 (a) that licenses be issued only for those water power projects which in the judgment of the Commission are best adapted to comprehensive plans of river improvement. The desirability of more thorough investigations than the Commission could make with its

limited staff to support such determinations soon became evident and the Act of March 3, 1925 (§ 3, 43 Stat. 1186, 1190) directed the Secretary of War and the Commission jointly to prepare and submit a list of streams on which comprehensive surveys should be undertaken and a list of the purposes for which projects should be proposed. The resultant lists of streams and purposes for which they should be improved were presented in 1926 and printed as House Document No. 308, 69th Congress, 1st Session. The recommended surveys were to be basin-wide in order to determine "the general scheme best adapted to comprehensive utilization of the water resources" for all public purposes and river improvements were to be proposed: (a) where the improvements by power developments, alone or in connection with navigation structures, would benefit navigation sufficiently to justify the Federal Government in sharing in the cost of the improvements; (b) where "the power development would be of considerable benefit to navigation but not sufficient in the light of present information to warrant large expenditures by the Federal Government on that account"; and (c) where the apparent benefits to navigation that could be derived from power development would be insignificant. Congress adopted the policy recommended by authorizing the Secretary of War and the Chief of Engineers to make surveys in accordance with the

report (Act of January 21, 1927, § 1, 44 Stat. 1010, 1015).

The first comprehensive report on the Roanoke River Basin was submitted in 1934 (H. Doc. No. 65, 74th Cong., 1st Sess.) and proposed a plan of development comprised of seventeen projects. In 1940 and 1942 two House Committees directed re-examination of the river basin, as a result of which a revised report proposing eleven projects was submitted as H. Doc. 650, 78th Cong., 2d Sess. (Ex. 1 herein), the report referred to in the specific subparagraph of Section 10 dealing with "Roanoke River Basin". Having secured a survey report to its liking, Congress approved it and authorized two of the eleven projects named therein, Buggs Island and Philpott. Approval of the general plan did away with further surveys in the Roanoke River Basin and crystallized the plan of development to be followed by the Army Engineers in constructing authorized projects, as Buggs Island and Philpott, and by the Commission in authorizing licenses for non-Federal development, public or private, under the Federal Power Act.

The Secretary's argument that even if there were a reasonable choice of meaning which could be attributed to the terms "approved" and "authorized" such choice must be resolved in favor of the public rather than in favor of a private corporation seeking the grant of a public privilege (Pet. in No. 658, 36) is beside the point

in this case. For no violence is done to the rule that the choice must be resolved against a private corporation since the Federal Power Act provides the full protection of the public's interest in its water power sites considered desirable by Congress and authorizes the issuance of licenses to such corporations, *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 427. None of the cases cited by the petitioners apply to situations where Congress has authorized the issuance of licenses to perform the acts against which the rule is invoked and where the interpretation adopted provides protection of the interests of the public and of the United States.

In an effort to buttress the statutory interpretation urged by him, the Secretary next argues that "it is unjust and unreasonable to surrender the fruits of the Government investment in Buggs Island to a private power company rather than distribute the power benefits among the people in the area" (Pet. in No. 658, 38–9). In effect the Secretary assumes and asks the Court to assume that there are benefits to the public under the 1944 Act, as he interprets that Act, preferable to the benefits to the public under the Federal Power Act. The Secretary points to no evidence to support that view. Furthermore, the argument is purely conjectural and speculative since Congress has not directed construction of Roanoke Rapids and there is no assurance that it will ever do so. The Secretary assumes the

validity of his arguments and, additionally, assumes that Congress sometime will appropriate funds for Roanoke Rapids, as well as the remaining projects proposed for the basin.

In any event, the argument is constructed on the theory that the Secretary will dispose of the power at rates based on the value of the Roanoke Rapids power output as if it had been developed by equivalent steam plants (Pet. in No. 658, 37–39; I, 223). But this is not the standard prescribed by Congress for disposition of power by the Secretary. Section 5 of the 1944 Act provides that the portion of the Government investment in multiple-purpose projects allocated to power shall be returned to the United States but limits the revenues to a sum equal to the cost of producing and selling the power, thus foregoing any profit (App., p. 33). What the Government pays out, it gets back. The basis is cost—not value.

As to Federal investment allocated to flood control, except insofar as reimbursement may come from headwater benefit charges under Section 10 (f) of the Federal Power Act, Congress has not provided for any return to the United States. If Roanoke Rapids is constructed by the licensee here, VEPCO, the United States, however, will be reimbursed under Section 10 (f) of the Power Act for such part of the annual charges for interest, maintenance, and depreciation on the entire headwater improvement at Buggs Island

as the Commission may deem equitable. The Commission found that the only benefit which would be conferred by Buggs Island upon Roanoke Rapids would be through an increase in the annual energy output amounting on the average to about 70,000,000 kilowatt hours and that there would be no increase in the dependable capacity (I, 55). The production of this much energy by a steam-electric generating plant, the Commission said, would cost about $250,000 a year (I, 56).

The Secretary's argument appears to suggest that licenses under the Federal Power Act should be denied in order to achieve the objective of rate competition with existing utilities through Federal power distribution (Pet. in No. 658, 37–8, 57). What merits this suggestion might have we do not undertake to say, and it appears to us as irrelevant to a determination of the issues in this case. For this much is clear, the Federal Power Act provides no basis in its provisions for denial of a license solely on this ground. Whatever may be the merits of this suggestion, it is not only foreign to the 1944 Flood Control Act but also foreign to the objective of the Federal Power Act to secure maximum water resource utilization through non-Federal licensees under safeguards which Congress has decided will fully protect the public interest. It is also directly contrary to the expressed intention of those members of Congress with long experience in the field of river development who did not so construe the 1944 bill when it

was in passage. For example, Chairman Whittington of the House Committee on Public Works, in presenting the bill to the House, made clear his understanding that the 1944 Flood Control Bill was limited to public works primarily for navigation and flood control and that none of the projects therein authorized were primarily for the generation of power (90 Cong. Rec. 4122):

> Many projects have been proposed under the guise of public works, but every proposal should be studied and tested. They should meet the requirements of sound public works. First, the project should have practical utility. Second, it should be economically sound. Third, it should be of the type that cannot compete with any facilities that can be provided through private enterprises. Federal public works should not conflict with private works and local public works.

For other statements to the same effect, see App. pp. 38–51. The competitor argument of the Secretary (Pet. in No. 658, 17–22) is directly contrary.

APPROVAL OF COMPREHENSIVE DEVELOPMENT PLANS DOES NOT MEAN EXCLUSIVE FEDERAL DEVELOPMENT

In discussing the sources of statutory construction the Secretary argues that all of the Army recommendations on river improvements since the 1936 Flood Control Act are for Federal development, each river basin being treated as an inseparable whole from which no single project can be licensed for non-Federal construction with-

out jeopardy to the basin plan and that removal would be in violation of the Acts of Congress approving such plans (Pet. in No. 658, 39–48).

The impact of the Secretary's contention is that Congress has embarked upon a policy of Federal power development as opposed to non-Federal power development and for that purpose Congress has discarded the Federal Power Act as the basis for developing water power sites under licenses which protect the interests of the public in those sites. The intention of Congress should be clear where the statutory effect is to nullify to a substantial extent a prior statute which Congress enacted after years of debate and in response to demands for congressional authorization of water power projects with full protection of public interests. The policy urged by the Secretary may be an appropriate one; we venture no opinion, for it is not germane to the issues in this case. A proper forum for the settlement of the question of congressional policy is Congress—not this Court.

Furthermore, there is a significant lack of any discussion in the legislative history, pro or con, which would indicate the understanding of any member of Congress or of anyone outside of Congress that in the 1936 Flood Control Act or in any subsequent legislation Congress was embarking upon a new policy of requiring the Chief of Engineers to limit his comprehensive plans to those

river improvements which he recommended for construction by the United States and that congressional approval of comprehensive plans should withdraw all of the recommended improvements from the licensing jurisdiction of the Federal Power Commission particularly where, as at Roanoke Rapids, the improvement would be provided for power generation alone.

The Power Act itself represented a considerable change in national policy when first enacted into law in 1920, *First Iowa Cooperative* v. *F. P. C.*, 328 U. S. 152, 180. The Secretary seeks to establish another major change in that national power policy—making Federal development primary and precluding licenses—a change which it is unreasonable to assume Congress intended to accomplish by a few obscure passages in legislation on flood control, adopted with no indication of either congressional or public awareness that any such change in policy was involved and after statements by responsible committee members indicating that no such change was contemplated.

When Congress intends to authorize Federal construction of projects named in a comprehensive plan of river development, it says so in no uncertain terms; e. g., in the same 1944 statute, one of the specific paragraphs of Section 10 authorized an appropriation "for the prosecution of the comprehensive plan approved in the Act of June 28, 1938, for the Upper Mississippi River Basin" (App., p. 36).

The separability of individual projects in these comprehensive river basin plans is clearly demonstrated by congressional action on the Clark Hill and Hartwell projects on the Savannah River, for which a comprehensive development plan was approved in the 1944 Act in practically the same language as that used for the Roanoke River (App., p. 35), as discussed by the court below (V, 36).

At the time Congress authorized the Hartwell project in 1950, the House Committee on Public Works considered but refused to report out bills to authorize construction of the Smith Mountain project in the Roanoke River Basin, H. R. 3250 and H. R. 3416, although Smith Mountain had been included in the comprehensive plan approved in 1944. During the pendency of these bills Congress was advised that the Commission was considering the VEPCO application for license under the Federal Power Act for the Roanoke Rapids project and still took no action to foreclose approval of that application (V, 36–39). From this the court below concluded that the failure of Congress "to withdraw projects within the plans approved from the licensing power of the Commission is an indication that it concurs in that position" (V, 38). To this, the Secretary's response is only that the court's conclusion is illogical (Pet. in No. 658, 28–9). He attempts no explanation of the failure of the House Committee considering the problem to state

in a Committee report or in appropriate statutory language that all of the sites recommended in approved Army plans were by such approval reserved for Federal development. The House Committee took no such action either with respect to approved plans generally or with respect to the Roanoke River plan in particular,[15] and no bill has been introduced in Congress to authorize Federal construction at the Roanoke Rapids site. *Cf. Colgate-Palmolive Peet Co.* v. *N. L. R. B.*, 338 U. S. 355, 364.

III

THE COMMISSION IS NOT BARRED BY SECTION 7 (b) OF THE FEDERAL POWER ACT FROM ISSUING A LICENSE FOR THE ROANOKE RAPIDS PROJECT.

On May 3, 1944, the Commission wrote the Chief of Engineers that it concurred in the conclusion of the Board of Engineers for Rivers and Harbors—

> that the comprehensive development of the Roanoke River basin, in general accordance with the plans prepared therefor by the District Engineer consisting of 11 dams and reservoir projects with power, is de-

[15] E. g., the 1921 amendment of the Power Act prohibiting the issuance of licenses for projects within the limits of any national park or national monument (41 Stat. 1353); the direction in the 1928 Boulder Canyon Project Act that the Commission should not issue or approve any permits or licenses under the Power Act upon or affecting the Colorado River or any of its tributaries (45 Stat. 1057, 1062); and the similar ban on licenses in the Potomac River Basin (45 Stat. 1012).

> sirable and that the Buggs Island and Philpott projects would constitute a desirable initial step in the development of the Roanoke River basin.

The comments of the Commission were transmitted to Congress with the reports and recommendations of the Army Engineers. The Secretary claims that the Court of Appeals (V, 40–2) was in error in holding that the Commission, after its letter of May 3, 1944, to the Chief of Engineers, was not precluded by Section 7 (b) of the Federal Power Act from approving the VEPCO application (Pet. in No. 658, 49–56).

The Army plans and recommendations here were submitted pursuant to resolutions of two House Committees pursuant to the 1936 and 1938 Flood Control Acts (Exhibit 1, p. 1). Hence, the letter of May 3, 1944, can in no sense be construed as a discharge of the Commission's statutory responsibilities under Section 7 (b) to refuse licenses for projects which in its judgment would affect water resources which should be developed by the United States. Furthermore, the letter did not recommend construction, Federal or otherwise, of Roanoke Rapids, although it did expressly recommend construction of Buggs Island and Philpott (I, 142).

However, assuming *arguendo* that the Commission's letter of May 3, 1944, amounted to a judgment for Federal construction within the meaning of Section 7 (b), which it was not, the

court was clearly right in holding that the letter did not preclude licensing. For Section 7 (b) merely precludes a license "whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself." These words do not mean that the Commission shall not, *at any time after such judgment has been reached,* approve any application, but only *when* or as long as the Commission's judgment is for Federal development. Thus, read literally, the words admit of the meaning that if at any time after the Commission has arrived at a judgment recommending Federal development it reaches a contrary judgment, by reason of changed circumstances, that the development should *not* be undertaken by the United States itself, the Commission may approve an application for license. It follows that the question is not one of jurisdiction, but of the correctness of the exercise of the Commission's judgment, which is clearly not a certiorari question.

That this was the intended meaning is shown by a comparison with Section 4 (e), where Congress clearly intended to carve out an exception from the Commission's licensing jurisdiction in favor of Federal power development at Government dams in any case in which "the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation." There Con-

gress made it clear that the Commission should not have power to issue a license for a period which is limited to two years "after it shall have reported to Congress the facts and conditions relating thereto." There is a complete absence of any similar ban for any period of time in Section 7 (b).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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The Secretary of the Interior and the Federal Power Commission are adverse parties in this proceeding, and I am authorizing each to be represented in the Supreme Court by agency counsel.

PHILIP B. PERLMAN,
Solicitor General.

APPENDIX A

FLOOD CONTROL ACT OF 1944. (58 Stat. 887):

SEC. 5 [58 Stat. at 890, 16 U. S. C. 825s]. Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most wide-spread use thereof at the lowest possible rates to consumers consistent with sound business principles; the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects

available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts.

SEC. 10 [58 Stat. at 891–2, 894]. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein: *Provided,* That the necessary plans, specifications, and preliminary work may be prosecuted on any project authorized in this Act to be constructed by the War Department during the war, with funds from appropriations heretofore or hereafter made for flood control, so as to be ready for rapid inauguration of a post-war program of construction: *Provided further,* That when the existing critical situation with respect to materials, equipment, and manpower no longer exists, and in any event not later than immediately following the cessation of hostilities in the present war, the projects herein shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements: *And provided further,* That penstocks and other

similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam authorized in this Act for construction by the War Department when approved by the Secretary of War on the recommendation of the Chief of Engineers and the Federal Power Commission.

* * * * *

ROANOKE RIVER BASIN

The general plan for the comprehensive development of the Roanoke River Basin for flood control and other purposes recommended by the Chief of Engineers in House Document Numbered 650, Seventy-eighth Congress, second session, is approved and the construction of the Buggs Island Reservoir on the Roanoke River in Virginia and North Carolina, and the Philpott Reservoir on the Smith River in Virginia, are hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in that report at an estimated cost of $36,140,000.

* * * * *

SAVANNAH RIVER BASIN

The general plan for the comprehensive development of the Savannah River Basin for flood control and other purposes recommended by the Chief of Engineers in House Document Numbered 657, Seventy-eighth Congress, second session, is approved and the construction of the Clark Hill Reservoir on the Savannah River in South Caroline and Georgia, is hereby authorized substantially in accordance with the recommendations of

the Chief of Engineers in that report at an estimated cost of $35,300,000.

* * * * *

UPPER MISSISSIPPI RIVER BASIN

In addition to previous authorizations, there is hereby authorized to be appropriated the sum of $10,000,000 for the prosecution of the comprehensive plan approved in the Act of June 28, 1938, for the Upper Mississippi River Basin, including the project for the Red Rock Dam on the Des Moines River for flood control and other purposes, substantially in accordance with the recommendations of the Chief of Engineers in House Document Numbered 651, Seventy-eighth Congress, second session, at an estimated cost of $15,000,000.

APPENDIX B

LEGISLATIVE HISTORY

1944 FLOOD CONTROL BILL, H. R. 4485

When the Senate Committee on Commerce was considering the 1944 Flood Control bill, Colonel Goethals, speaking for the Chief of Engineers, presented a statement dealing with the Yadkin-Pee Dee basin and a recommendation (similar to that for the Roanoke River basin) that a general plan be approved and one specific project (Wilkesboro) be authorized for construction. The following colloquy was recorded:

> SENATOR BURTON. Will all of those other dams that are in the future be primarily for power purposes?
>
> Colonel GOETHALS. Yes, sir; primarily for power purposes.
>
> Senator CORDON. Colonel, when you compute the ratio of cost to benefit, you include the benefit of power generation?
>
> COLONEL GOETHALS. Yes, sir.
>
> Senator CORDON. Does that represent a considerable part or portion of the benefit?
>
> Colonel GOETHALS. Yes, sir; in these basins it does.
>
> * * * * *
>
> Senator OVERTON. It is my offhand opinion that we would not be justified in authorizing a project purely for power. It must have as a foundation flood-control benefits in some substantial amount. What

have you to say about that, General Reybold?

General REYBOLD. We do have flood-control benefits in important amounts in these initial projects on the Roanoke and Yadkin-Pee Dee Rivers.

Senator OVERTON. Yes; you have it. I think that there should be a statement of the extent of the flood-control benefit. A very serious question presents itself, for our Congress to construct a dam solely for the purpose of power, that has no relation to flood control or navigation.

Senator BURTON. It would be helpful, for our chairman, if in the statement it could be shown what proportion of this ratio is related to flood control and what proportion to power.

Senator OVERTON. That is what we want. That is what we want done in each one of these projects—how much of the benefit is flood control, and how much is power. There is none, I understand of irrigation?

Colonel GOETHALS. No, sir; no irrigation. (The information requested for the Buggs Island, Philpott and Wilkesboro projects is as follows:) * * *

The information referred to was then given for Buggs Island, Philpott, and Wilkesboro, the projects proposed to be "authorized" for construction. No such information was furnished with respect to other projects in either the Roanoke or the Yadkin-Pee Dee Basins. The discussion on these two river basins was concluded with these comments:

Senator OVERTON. I think, however, that every project in this bill or any other authorized bill, should have as part of its basis a substantial benefit resulting from

flood protection, and for that reason I think, in the estimating of benefits, the benefits to be derived from flood control should be estimated, and, as Senator Burton has pointed out, should be separately estimated, so that Congress can more intelligently pass upon it.

Senator BURTON. I can conceive of how there might even be more than 50 percent of the benefit for power under some urgent situation of a very serious flood need, whereas with one-fourth flood and three-fourths power you would need to be shown that there was a very serious flood-control need that justified that large expenditure on power.

(Hearings on H. R. 4485, Senate Committee on Commerce, 78th Cong., 2d Sess. (1944), pp. 28–30 and 31, respectively.)

* * * * * *

Mr. WHITTINGTON. The Committee on Flood Control has adhered to the policy of reporting bills and reporting projects where the dominant interest is flood control. It often appears that navigation, irrigation, or power is involved. Provisions are made for their development. Differences of opinion in executive departments as to the dominant interests respecting a few of the projects included in the bill exist. All interests were heard, and only those projects where the preponderance of the testimony showed that flood control was paramount are contained in the pending bill (90 C. R. 4122).

* * * * * *

Mr. FLOUTMAN. * * * It has been the policy of the Committee on Flood Control to recommend only such projects as will provide primarily for protection against

floods and the generation of electricity and other purposes have been given secondary consideration. * * *

It should be the policy of Congress to place each project under the test as to whether or not the primary objective is the control of floods (90 C. R. 4139).

* * * * * *

Mr. WHITTINGTON. There are no facilities and no power projects authorized in this bill. The general law will obtain. If a reservoir is authorized and if the Federal Power Commission thinks that a penstock should be installed, and the Secretary of War agrees with it, there will be a penstock installed in the reservoir. But no power project is authorized in the bill.

Mr. RANKIN. That is according to the law passed in 1938?

Mr. WHITTINGTON. I say that is under existing law.

In further answer to the gentleman's question, we have repeatedly stated during the debate that no project, reservoir, or dam, or other improvement is embraced in this bill unless it is primarily for flood control. If power can be developed as an incident, or if reclamation can be provided, they are cared for in the bill (90 C. R. 4199).

* * * * * *

Mr. WHITTINGTON. Under leave to extend, as I stated, none of the dams authorized in the pending bill provide primarily for the generation and distribution of power. The dominant interest in all of the dams is flood control. Such has been the case in previous flood-control bills. There are some dams authorized where power is incidental. In such cases where

the report so states, provision is made for power, but there is no provision generally for power in the reservoirs authorized. I recall that in some of the flood control dams provision is made for power to provide for utilization in reclamation. This is true with respect to dams in Kings and Kern Rivers, but I repeat that there is no provision in the bill generally for the establishment of power facilities and for the distribution of power. In all cases it will be necessary for Congress in the future to make distribution and to provide facilities for the sale and distribution of any power that may be generated at any of the dams. There is provision for power in a few of the large dams along the tributaries of the Ohio, but the authorizations in the pending bill will not provide for the completion of these reservoirs, in my judgment, where power may be generated, and it will be necessary for Congress to make provision in the future for power facilities and distributions. I repeat that where power is incidental, flood control being the dominant interest, there are in some reservoirs provisions for generating power, but there is no provision for the distribution and sale of power. In responding to the questions, I made the statement that there was no provision in any of the reservoirs for the generation of power. I made that statement having in mind that there were no reservoirs authorized in the bill primarily for power. In a few of the reservoirs, as in the case in reclamation reservoirs, there is a provision for the generation of power, but in no reservoir is there any provision for the distribution and sale of power, and I repeat that before such sale and distribu-

tion can be made it will be necessary to obtain further congressional authority (90 C. R. 4202).

* * * * * *

Mr. WHITTINGTON. In response to the gentleman's question I will state that is the policy that was announced in the presentation of this bill. The dams are primarily for flood control (90 C. R. 4219).

* * * * * *

Mr. MCCLELLAN. * * * It is further my judgment, Mr. President, that all projects on navigable streams, on all streams where flood control is a vital problem, should be constructed with a view to controlling floods and in aid of navigation. Those ought to be the primary purposes of the construction. * * * I believe, except for the projects which might be constructed on the upper stretches of the streams primarily for irrigation purposes so as to impound water for that use, that all projects constructed in the lower valleys should be constructed primarily to control the floods, and then for the secondary purpose of generating power.

It matters not, Mr. President, how much cheap power we are able to generate and give to the people in a valley by the construction and operation of a dam, if we do not give them protection from devastating floods; we can easily see all the fruits and benefits which come to any section from cheap power washed away and lost when the floods come. The dams ought to be constructed primarily for the purpose of flood control and navigation and secondarily for the purpose of generating power.

I subscribe wholeheartedly to the policy

set forth in the flood-control bill, especially in section 1 thereof (90 C. R. 8248).

* * * * * *

Mr. CLARK of Missouri. It seems to me that in this debate it has been overlooked to a very large extent that this is a flood-control bill, not a navigation bill, not a river and harbor bill, not a power bill. It is a flood-control bill; and the question of flood control, not in Montana, but in the lower region of the Missouri River and of the Mississippi River, is the most acute problem we have to face (90 C. R. 8251).

Mr. BARKLEY. Mr. President, I am assuming that these dams must be constructed in order to accomplish flood control, which is the object of the bill (90 C. R. 8325).

* * * * *

Mr. OVERTON. * * * Personally, so far as I am concerned, I wish that it had not been necessary to incorporate any irrigation or power provision in the flood-control bill or in the river and harbor bill. I wish that those two bills could have been limited, as they have been traditionally and historically limited, to the mere authorization of projects. After the projects have been authorized, if any hydroelectric energy is created, some other committee, in connection with some other bill, should determine just how the Bureau of Reclamation should handle the power. However, the baby was placed squarely on the lap of the Committee on Commerce. We had to do something about it, and we did the best we could. That is my whole attitude toward the question (90 C. R. 8330).

* * * * *

Mr. WALSH of Massachusetts. It seems to me that this whole question comes down to a proposal to create a new policy and to prevent the generation of electricity when it can be generated at flood-control dams. So far as I am concerned, I want every dollar spent by the Federal Government on such projects to be used, if it is humanly possible, for the development of electricity and for the sale of it to the people at the lowest possible cost. * * *

* * * * *

I am assuming that the Army engineers will recommend the building of a dam primarily for flood-control purposes; but an incidental purpose may be the development of electricity. I think it is a shame that in all this legislation one dam in a particular State should be selected at which no electricity may be developed, when it is the policy of the committee to develop electricity if it can be done (90 C. R. 8479).

* * * * *

Mr. OVERTON. The projects in this bill are along the lines suggested by the President. According to the testimony, as appraised by the Committee on Commerce, there are no projects in this bill proposed to be constructed by the Army engineers in which the interests of flood control do not predominate, and in the rivers and harbors bill there are no projects in which the interests both of flood control and navigation are not the predominating and controlling factor (90 C. R. 8625).

Mr. BARKLEY. The Senator would require me, in answer to that question, to coordinate from memory the provisions of the Federal Power Act. Many years ago

we passed the Federal Power Act, setting up the Federal Power Commmission, which was instructed, under the law, to cooperate with the Corps of Engineers in the construction of dams for power purposes. I could not from memory give all the provisions of the Power Act, but there is nothing inconsistent between the Federal Power Act and the various annual appropriations by Congress for the improvement of rivers and harbors, or even flood control. * * *

Mr. MAYBANK. The Senator from Kentucky mentioned the Federal Power Commission law. I should like to ask the Senator from Kentucky if it is not a fact that the construction of any of these dams might have in view the generation of electricity. After they have been approved by the Army engineers, as the Senator suggested, is it not necessary that additional hearings be held by the Federal Power Commission before any permission is granted for the sale of power?

Mr. BARKLEY. I think that is true. They have general authority, under the law, to pass upon a license before disposing of power generated by a dam, even though the dam is approved by the Chief of Engineers.

The primary function of the Corps of Engineers in regard to the improvement of rivers originally was to pass upon whether a proposed improvement would obstruct navigation or improve navigation. That has been enlarged from time to time. By and large, any prospective producer of power must have a license from the Federal Power Commission.

Mr. MAYBANK. How about the Government?

Mr. BARKLEY. I am not able to say from memory whether that applies to the Government.

Mr. MAYBANK. But before a prospective producer of power on any river can get his license the Federal Power Commission holds proper hearings?

Mr. BARKLEY. That is true; they have to do that; they have to determine who is best able to produce the power.

Mr. MAYBANK. Or whether it is necessary.

Mr. BARKLEY. Yes.

Mr. MCCLELLAN. That would not apply to the multiple projects, would it?

Mr. BARKLEY. Only incidentally, because sometimes the production of power in flood-control projects is incidental. Indeed, in most cases it is incidental. (90 C. R. 8254).

Mr. BARKLEY. * * * Furthermore, if the Government is to start out and build dams for navigation or flood control and make no provision whatever for the creation of power it is extremely doubtful whether any private enterprise will ever undertake the job of building a dam on a river in a given locality solely for the production of power. * * *

It is my honest opinion that if we now reverse our course, if we reverse our policy, as this amendment seeks to do in a way—not completely, but it goes a long way in the direction of reversing our course—if we are to limit our construction of dams either to flood control or navigation without regard to any power possibilities it will be a long time before the people of the regions affected will have an opportunity to use any power that might be generated by

the construction of dams on the rivers we are talking about (90 C. R. 8327).

Mr. WHEELER. Frankly, I believe that when private enterprise wishes to build dams for flood control, or other purposes, and it can do as good a job as the Government in the prevention of floods, it ought to be permitted to do so, and the Federal Government ought not to step in. I am assuming—perhaps I am mistaken—that these flood-control projects are being built by the Government essentially for flood control. However, in the case of every dam which is built, there is bound to be some primary power developed; and if the Government can recoup some of the money which it has put into such a project, it ought to be permitted to do so (90 C. R. 8333).

1938 FLOOD CONTROL BILL

HOUSE REPT. 2353, 75TH CONG., 3D SESS.

The bill represents a truly comprehensive effort definitely to meet the widespread public demand for effective flood control throughout the United States, and it contains general legislation having this purpose in view.

More than ten years ago the Congress, foreseeing the growing public demand for improvements for flood control and allied purposes, authorized comprehensive surveys for the purpose of initiating actual improvements with tangible results. * * *

As a result and following the great floods of 1935 and 1936 the Congress passed the Act of June 22, 1936, which established a national policy for flood control and effected a beginning of improvements to accomplish the national purpose,

but this beginning, although a great step in the right direction, did not fully meet the public demand. * * *

The bill is thus an enlargement and expansion of the policy and of the program adopted in 1936. The problem of flood control is attacked on all fronts. Flood walls and river walls are authorized for priority and emergency control; reservoirs on the tributaries are authorized to detain the waters at their source. Wherever power can be developed in these reservoirs, as in the case of the act of 1936, provision is made for such power. All reservoirs heretofore adopted and all reservoirs authorized in the pending bill provide primarily for flood control. Only two of the dams in the bill provide for the development of power.

* * * * *

The bill approves the general comprehensive plans of each drainage basin considered, but authorizes only enough money to initiate the more important projects in such drainage basin. This procedure insures that the works authorized will fit in with the final comprehensive plan, and avoids the necessity of delaying the urgent improvements until enough money can be authorized to convert the costs of the complete comprehensive plan.

Practical results cannot be accomplished in any other way. Improvements both governmental and private throughout the United States have always been initiated and developed subject to available funds to meet the reasonable needs of each period of time * * * (House Rept. 2353, 75th Cong., 3d Sess.).

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Mr. WHITTINGTON. * * * I call attention to the fact that all projects for local protective works and all reservoirs that may be constructed are contained in the plan and documents mentioned and are set forth in the analysis of the bill in the report of the Committee. The projects are to be selected by the Chief of Engineers, but he is confined in all of the drainage basins to the projects set forth in the hearings and specifically named in the report of the Committee. * * *

The reservoirs recommended are primarily for flood control. A choice must be made. If the reservoirs are to be for flood control, the generation of power would be expensive. I believe it is possible for the New England reservoirs to be constructed because of the reduced local contribution under the terms of the pending bill (83 C. R. 7139).

Mr. NORRIS. * * * That is what I should like to see done, I will say to the Senator, in connection with all these dams. Flood control is the first demand; flood control is the main object; flood control must not be given up for any other purpose; it is the dominating objective; it is the reason why we appropriate the public money to prevent damage not in one little locality alone but all over the United States. Power, not in all but in many cases, is a byproduct, as it were, and we ought not to throw away that valuable byproduct. * * *

Mr. NORRIS. * * * I think the decision in such matters ought not to be left to the engineers. It might be left to the Federal Power Commission, whose business it is to study the question, and who now know, from studies which have al-

ready been made, what is proper, and whether or not power ought to be developed, or whether there is only a possibility that power may be developed in the dim future, in which event they would do as the Senator says—put in a penstock and wait for time to determine whether or not they ought to make a further improvement. * * *

This bill leaves it with the Army engineers. The Secretary of War is the head of it. As President Roosevelt said in his veto message of Joint Resolution 57, he is opposed to the Secretary of War and the Army engineers, able as they are, fixing the policy of the Government in relation to various matters and I will say, so far as my opinion goes, they should not fix the policy as to the development of hydroelectric power. * * *

Mr. MILLER. In connection with what the Senator is saying as to determining the question whether or not the installation of penstocks should be provided for at the time plans are made for a dam, I find myself in agreement with the Senator on that contention; but I am wondering about another aspect of the situation. The Water Power Act, with which I know the Senator is very familiar, provides that the Federal Power Commission, in determining the feasibility and in determining upon plans for the construction of a dam, shall consult three agencies of the Government; the engineer of the Agricultural Department, the engineers of the Interior Department, and the Army engineers. In addition

to that, the Federal Power Commission, as I understand has a corps of its own engineers. * * *

I think the best thing to do would be to provide for a consultation with the Federal Power Commission, with its facilities, to determine that question.

Mr. NORRIS. I think they are far better qualified to decide the question of policy than are the Army Engineers.

Mr. MILLER. I mean, the determination of the question with regard to the installation of penstocks. I think that would serve the purpose.

Mr. NORRIS. That would be a great improvement, I think. The question of putting in a penstock does not settle the whole matter however, when a dam is being built (83 C. R. 8612–4).

* * * * *

Mr. HILL. * * * The truth is, the Senator's amendment merely follows the policy which the Congress of the United States adopted away back in 1925, when it provided for an examination and a survey of practically all the first-class rivers, so to speak, in the whole United States. * * *

The duty of surveying these rivers, and of working out a plan and a program, was placed by the Congress jointly on the Federal Power Commission and the Corps of United States Engineers. All that the amendment of the Senator from Kentucky does is to continue that policy and that joint responsibility on both the Federal Power Commission and the Army Engineers. Through the passage of this bill we are starting some ninety-odd projects which will cost an amount running into millions and doubtless the hundreds of millions of dollars. Why should we

not have the advice, the knowledge, and the information of the Federal Power Commission in carrying out this great program?

* * * The Senator knows that the Federal Power Act, which creates the Federal Power Commission, was written after not merely many months but many years of study and effort on the part of some of the best minds and the most distinguished Members the Congress of the United States has ever had. They worked diligently for years to work out a power policy, and to draft a power act to carry out that policy for the United States.

In that act they set up the Federal Power Commission, and they vested the Federal Power Commission with the duty and the responsibility of doing the very things which the Flood Control Act now provides—making investigations, collecting and recording data concerning the utilization of the water resources of any region to be developed, the water-power industry, and all kindred and allied subjects and purposes. All that we are doing by the amendment of the Senator from Kentucky is to carry out the policy which the Congress, after many years of thought and effort and consideration, laid down (83 C. R. 8618).

Mr. WHITTINGTON. * * * Under existing law penstocks may be installed in any dam when approved by the Secretary of War upon the recommendation of the Chief of Engineers. The bill as agreed to in conference goes a step further. The Federal Power Commission represents the Government in its power policies. * * * Again as the representative of the Federal Government, the bill provides, as agreed to in conference, that

penstocks shall be installed when approved by the Secretary of War upon the recommendation of the Chief of Engineers and of the Federal Power Commission. Substantially all of the reservoirs are primarily flood-control reservoirs. They are to be selected by the Chief of Engineers, but there should be cooperation. As agreed to, the bill provides that the Federal Power Commission shall have a voice as to the installation of penstocks. Such a provision is entirely proper (83 C. R. 9293).

U. S. GOVERNMENT PRINTING OFFICE: 1933